88-306

No. ———

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

INTERNATIONAL ASSOCIATION OF BRIDGE, STRUCTURAL AND ORNAMENTAL IRON WORKERS, ETC., LOCAL 3, AFL-CIO,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD

and

JOHN DEKLEWA, THEODORE DEKLEWA and ROBERT DEKLEWA, d/b/a JOHN DEKLEWA & SONS and/or JOHN DEKLEWA & SONS, INC.,
Respondents.

CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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QUESTION PRESENTED

Congress determined in enacting § 8(f) of the National Labor Relations Act, as amended, that National Labor Relations Board conducted representational elections "are not feasible" in a "large segment" of the construction industry and that in the normal case the signatory union to a § 8(f) pre-hire agreement permitted by § 8(f) will be the majority representative of the employees who work under the agreement. The question presented by this cross-petition is:

Whether, in the face of these congressional determinations, the NLRB's adoption of a *per se* rule requiring a construction industry union which is signatory to a § 8(f) agreement to prevail in a Board-conducted representation election (or as an equivalent to secure voluntary employer recognition as the majority representative of the employer's current employees) in order to enjoy full exclusive bargaining representative status, is contrary to law? *

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* The parties to this proceeding are International Association of Bridge, Structural and Ornamental Iron Workers, etc., Local 3, AFL-CIO, John Deklewa, Theodore Deklewa and Robert Deklewa, d/b/a John Deklewa & Sons and/or John Deklewa & Sons, Inc., and the National Labor Relations Board.

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Respondents.

CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

International Association of Bridge, Structural and Ornamental Iron Workers, etc., Local 3, AFL-CIO, ("the Union"), petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit in *International Ass'n. of Bridge, Etc., Local 3 v. NLRB*, 843 F.2d 770 (3d Cir. Nos. 87-3121, 87-3192 & 87-3231; April 12, 1988). This cross-petition is conditioned on the granting in whole or in part of the petition for a writ of certiorari in *John Deklewa, et al. v. NLRB et al.*, Supreme Court No. 88-70, which seeks

review of the same judgment and which was served on counsel for the Union on July 11, 1988.[1] The Union is filing contemporaneously herewith a brief in opposition to the *certiorari* petition in No. 88-70; in the event that petition is denied, the Union requests the Court to deny this petition as well.

STATEMENT OF THE CASE[2]

This case proceeded on a stipulation of facts (Pet. App. 1a-15a)[3] which the National Labor Relations Board fairly summarized in its decision herein. We therefore state the facts by reprinting that summary (omitting only the facts relevant to establishing the Board's jurisdiction and a discussion of a grievance filed under the collective bargaining agreement here that is no longer relevant):

> . . . John Deklewa & Sons, Inc., a Pennsylvania corporation, has an office in Bridgeville, Pennsylvania, where it is engaged in the business of heavy construction. . . . John Deklewa & Sons, a partnership with an office at the same location as the . . . Corporation, is engaged in the construction of commercial and industrial buildings. . . .
>
> • • • •
>
> The Iron Workers Employer Association of Western Pennsylvania, Inc. (the Association) is an organization composed of approximately 35 construction industry employers. The Association represents

[1] The citations to the opinions below, the basis of this Court's jurisdiction and the pertinent statutory provisions are set out at pp. 1-2 of the *certiorari* petition in No. 88-70, and are therefore not repeated here.

[2] With a minor change in the first paragraph, this statement of the case is taken verbatim from the statement in the Brief In Opposition For Respondent Union in the connected case of *John Deklewa, et al. v. National Labor Relations Board, et al.*, No. 88-70.

[3] "Pet. App." refers to the appendix to the *certiorari* petition in the connected case of *John Deklewa, et al. v. NLRB, et al.*, No. 88-70.

its employer-members in negotiating and administering collective bargaining agreements with the [International Association of Bridge, Structural and Ornamental Iron Workers, Local 3, AFL-CIO]. The Association and the Union have been parties to successive collective bargaining agreements for at least the past 30 years, the most recent relevant contract having been effective 1 June 1982 through 31 May 1985.

On 24 June 1960 the [Employer] entered into a prehire agreement with the Union under which the [Employer] agreed to be bound by the provisions of the contract between the Association and the Union. For the next 20 years the [Employer] executed and adhered to the successive Association-Union collective-bargaining agreements. The [Employer] did so as a separate entity and not by virtue of any membership in the multiemployer group.

In June 1980 the [Employer] became a member of the Association, and subsequently executed the 1982-1985 agreement with the Union. This contract had a 60-day notice of termination provision, an exclusive hiring hall provision, and a union-security clause. On 21 September 1983 the [Employer] timely resigned its membership in the Association. The Association has not opposed this resignation, but it considers the [Employer] bound to the terms of the 1982-1985 agreement. On the same date that it resigned from the Association, the [Employer] notified the Union that it was repudiating the contract and withdrawing recognition. The [Employer] was not engaged in any construction projects on 21 September 1983 on which it directly employed employees covered by the 1982-1985 labor agreement, and from that date until the 3 May 1984 date of the parties' stipulation the [Employer] has not directly employed any such employees.

By letter dated 27 September 1983, the Union objected to the [Employer's] repudiation of the agreement and withdrawal of recognition . . . .

The parties stipulated that from June 1960 until its September 1983 repudiation: the [Employer] relied exclusively on the Union's hiring hall for its ironworkers; all these employees were union members; they were hired on a jobsite-to-jobsite basis; and the [Employer] adhered to the terms of the applicable collective-bargaining agreement on all its projects. On many of these projects the [Employer] did not hire ironworkers directly, but used subcontractors who were signatory to the Union-Association agreement.

At all times material here, approximately 30 of the 35 members of the Association have, on a continual and regular basis, been engaged in projects requiring the direct employment of employees covered by the Association-Union agreement. These employees have been members of the Union or have adopted the Union as their collective-bargaining representative. A majority of such employees moved from job to job and from employment by one member of the Association to another in response to work opportunities. Between 1 June 1982 and the date of the stipulation here, the [Employer] engaged in three projects on which it directly employed employees covered by the 1982-1985 agreement, the last of which was completed in April 1983. [Pet. App. 53a-56a.]

On these facts the Board found that

> the [Employer] violated Section 8(a)(5) and (1) by repudiating the 1982-1985 contract with the Union and withdrawing recognition during the contract's term. The [Employer] voluntarily entered into an 8(f) relationship with the Union and signed the contract. This contract was binding, enforceable, and not subject to unilateral repudiation by the [Employer]. Because the contract has expired, however, the Union enjoys no continuing presumption of majority status, and the [Employer] is not compelled to negotiate or adopt a successor agreement

> based solely on the existence of an 8(f) relationship. In addition, the Union is not entitled to engage in any coercive conduct, including strikes and picketing, to force the [Employer] to execute a successor 8(f) agreement. [Pet. App. 96a.]

These findings were predicated on the Board's decision to abandon its then-current approach to § 8(f) of the National Labor Relations Act, as amended, 29 U.S.C. § 158(f)—the provision which permits employers and unions in the construction industry to enter into collective bargaining agreements even though the union's majority status is not established prior to doing so—and to instead "apply the following principles in § 8(f) cases":

> (1) a collective-bargaining agreement permitted by Section 8(f) shall be enforceable through the mechanisms of Section 8(a)(5) and Section 8(b)(3); (2) such agreements will not bar the processing of valid petitions filed pursuant to Section 9(c) and 9(e); (3) in processing such petitions, the appropriate unit normally will be the single employer's employees covered by the agreement; and (4) upon the expiration of such agreements, the signatory union will enjoy no presumption of majority status, and either party may repudiate the 8(f) bargaining relationship. [Pet. App. 58a-59a.]

On cross petitions for review filed by the Employer and the Union, and the NLRB's petition for enforcement, the Court of Appeals affirmed the Board in all respects.

REASONS FOR GRANTING THE WRIT

In its decision in this case, the National Labor Relations Board stated two basic rules for implementing § 8(f) of the National Labor Relations Act, as amended, the provision permitting employees and unions in the construction industry to enter into collective bargaining agreements even though the union's majority status is not established prior to doing so:

> (1) a collective-bargaining agreement permitted by Section 8(f) shall be enforceable through the mechanisms of Section 8(a)(5) and Section 8(b)(3); . . . and [2] upon the expiration of such agreements, the signatory union will enjoy no presumption of majority status, and either party may repudiate the 8(f) bargaining relationship. [Pet. App. 58a-59a.]

The Employer's *certiorari* petition in *John Deklewa, et al. v. NLRB, et al.*, No. 88-70, challenges the first of these rules. We submit, for the reasons developed in our brief in opposition there, that review by this Court of the Board's present approach to § 8(f) is premature at this nascent stage in the process of litigating elucidation.

In this conditional cross-petition, we submit further that if the Court determines that the time is ripe to consider the status and effect of § 8(f) agreements, that consideration should include not only the Board rule that governs while the agreement runs its limited term but also the rule that governs when the agreement terminates; the inevitable next stage in a continuous process.

Given the inextricable interrelation between the two Board rules, we believe that the Court would clearly benefit in its deliberations by considering both together. And we believe, too, that in terms of judicial efficiency such an approach is superior to the alternative of considering the rule governing § 8(f) agreements during their term on its own. These points seem to us largely self-evident and we therefore do not belabor either one.

It is our position, moreover, that while the Board rule challenged by the Employer's *certiorari* petition in No. 88-70 is entirely correct, the related Board rule we call into question here is entirely wrong. The second part of that proposition is, to be sure, not self-evident and at this juncture we therefore outline our supporting argument.

Under the narrowest standard for judicial review of agency action—the "arbitrary and capricious" standard

—the agency's ruling must be "*rational*, based on consideration of the relevant factors and within the scope of the authority delegated to the agency by the statute." *Motor Vehicle Mfrs. Assn. v. State Farm Mut.*, 463 U.S. 29, 42 (1983) (emphasis added). The Board rule that "upon the expiration of § 8(f) agreements, the signatory union will enjoy no presumption of majority status, and either party may repudiate the 8(f) bargaining relationship," Pet. App. 59a, is inconsistent with the Board's own statement of the premises on which Congress acted in enacting § 8(f) and thus fails in the most basic sense to meet the test of rational agency decisionmaking.

The Board recognized that the 1959 Congress crafted § 8(f) to fit the collective bargaining system fostered by the NLRA into the following unique characteristics of the construction industry:

First, since the Board did not take jurisdiction over the construction industry until 13 years after the NLRA was passed it "had become established practice in the construction industry for employers to recognize and enter into collective-bargaining agreements with a construction industry union for periods ranging from 1 to 3 years even before any employees had been hired. S. Rep. 1 Leg. Hist. 423." Pet. App. 66a.[4] While "the Board had found unlawful the bargaining, referral, hiring, and employment practices common in the industry," Pet. App. 67a, the 1959 Congress regarded those practices as desirable and worthy of preservation because the industry pattern is essential to meet the needs of industry employees who wish to engage in collective bargaining as well as the needs of industry employers who must, e.g., "know [their] labor costs before making the estimate

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[4] The Board decision uses the form "S.Rep." and "Leg. Hist." to refer to S. Rep. No. 187, 86th Cong., 1st Sess. (1959) and to the NLRB, Legislative History of the Labor-Management Reporting and Disclosure Act of 1959 (G.P.O. 1959) and we incorporate the Board's form herein.

upon which [their] bid will be based . . . ," Pet. App. 66a quoting S. Rep., 1 Leg. Hist. 424.

Second, Congress recognized, too, that in "construction, an employee or group of employees 'typically works for many employers and for none of them continuously. Jobs are frequently of short duration, depending on various stages of construction.' S. Rep., 1 Leg. Hist. 423. . . . [B]ecause of the short and sporadic periods of employment typical to the industry, '[r]epresentational elections in a large segment of the industry are not feasible,' S. Rep., 1 Leg. Hist. 451-452." Pet. App. 66a-67a.

And, *third*, Congress recognized that "[a] substantial majority of the skilled employees in [the construction] industry constitute a pool of . . . help centered about their appropriate craft union," Pet. App. 66a, quoting S. Rep., 1 Leg. Hist. 424, and that " '[i]f the employer relies upon this pool of skilled craftsmen, members of the union, there is no doubt under these circumstances that the union will in fact represent a majority of the employees actually hired.' S. Rep., 2 Leg. Hist. 424." Pet. App. 71a.

Given Congress' premises in enacting § 8(f), two conclusions follow ineluctably.

(1) Congress recognized that "[r]epresentational elections in a large segment of the industry are not feasible." Thus requiring a construction industry union to obtain a Board certification after a representation election (or its equivalent, employer recognition based on proof of a majority among the employer's current employees) in order to secure full exclusive representative status frustrates Congress' intent in enacting § 8(f).

(2) Congress recognized that a pre-hire agreement between an employer and a construction industry union which results in the employer hiring from the skilled pool of craftsmen centered about that craft union to be *as*

reliable an indicator that the union is the employees' chosen collective bargaining representative as a certification after a representation election in other industries covered by the Act; as the 1959 Senate Report put it, "there is no doubt under these circumstances that the union will in fact represent a majority of the employees actually hired." Again the failure to recognize as much frustrates Congress' intent in enacting § 8(f).

The Board has nonetheless laid down a *per se* rule that a construction industry union can obtain full exclusive bargaining representative status—with all the rights and privileges of that status—*only* if the union is certified after a Board-conducted representation election or is voluntarily recognized by the employer on the basis of proof of majority among the employer's current employees. Pet. App. 59a; 84a.

Absent such a certification or recognition, at the expiration of a § 8(f) agreement, the decision below grants the signatory employer the unfettered option to refuse to deal with the signatory union *without regard to the length of their prior relationship and without any basis for doubting the particular union's majority status.* Granting employers such an option cuts deeply against the NLRA policy of "channeling conflict between labor and management," *First National Maintenance Co. v. NLRB*, 452 U.S. 666 (1981), as a means of minimizing industrial strife. Furthermore, the Board's decision *strips the union, and the employees the union represents, of the right to strike or picket in an effort to secure a successor agreement.* Doing so is equally inconsistent with the Act's emphases on "equalizing the bargaining power of the employee with that of his employer," *NLRB v. City Disposal Systems, Inc.*, 465 U.S. 822, 835 (1984).

Plainly then the Board's conclusion that recognition through a § 8(f) agreement is *never* a sufficient basis for full exclusive representative status is at war with

Congress' premises in enacting § 8(f) as the Board itself restated those premises. As we have seen, the legislative effort that produced § 8(f) was not aimed solely at making certain types of contracts enforceable for their term; § 8(f) rests on the premise that the usual processes for obtaining full exclusive representative status—the very process the Board here has required construction industry unions to invoke—are *not* practicable in this industry and that alternative means for obtaining that status are required. Driving construction unions back to the Board's election processes in this way makes a mockery of the legislative process as it unfolded in 1959.

The Board offered a single justification for the anomaly its decision creates:

> If, . . . a union acquires full 9(a) status based . . . on the employer's adoption of an 8(f) agreement . . . the signatory union . . . could lawfully seek to compel the employer, through strikes or picketing, to negotiate and sign a successor agreement. This would be directly contrary to the express congressional mandate that an employer cannot be coerced, through strikes or picketing, into negotiating or adopting an 8(f) agreement.[39]

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[39] The Conference Report on the 1959 amendments, see 2 Leg. Hist. 934, 946, states that "[n]othing in [Section 8(f)] is intended . . . to authorize the use of force, coercion, strikes, or picketing to compel any person to enter into such [8(f)] agreements."

[Pet. App. 80a-81a.]

The NLRA, as this Court has noted, embodies a "Congressional concern about coerced designations of bargaining agents," *NLRB v. Iron Workers*, 434 U.S. 335, 347 (1978) (*Higdon Construction Co.*); for that reason, § 8(b)(7) of the Act strictly limits the use of "economic weapons to force recognition from an employer," *id.* at 346. But once a bargaining relationship is established, the Act allows for the free play of economic forces as "part and parcel of the process of collective bargaining."

Labor Board v. Insurance Agents, 361 U.S. 477, 494 (1960).

The legislative history respecting the use of economic force to secure a § 8(f) agreement must be understood in this context. As the Board itself recognized in its earliest decisions under § 8(f), what concerned the 1959 Congress was the use of economic coercion as part of "an *initial* attempt by a union and an employer in the construction industry to commence . . . a [bargaining relationship]." *Bricklayers Local 3*, 162 NLRB 476, 478 (1966) (emphasis added). Senator Kennedy made this explicit in the very statement that establishes the congressional intent to preclude union coercion: "The purpose of this section is to permit voluntary prehire agreements. *This is because of the inability to conduct representation elections in the construction industry.*" 2 Leg. Hist. 1715.

In § 8(f), Congress thus sought to assure that construction industry employers would be free to enter, or not enter, a prehire agreement in the *same* way—and to the *same* extent—that employers in other industries were (and are) free to decide whether to extend voluntary recognition to a union. There is no hint in the legislative materials that Congress sought to insulate construction industry employers from economic pressure respecting the terms of *successor* agreements, any more than any other employer who extends voluntary recognition to a union is insulated from such pressure in negotiations for successor agreements.

Thus, on examination, the Board's purported justification of its *per se* rule that "upon the expiration of [§ 8(f)] agreements, the signatory union will enjoy no presumption of majority status, and either party may repudiate the § 8(f) relationship," Pet. App. 59a, turns out to provide no justification at all for that rule.[5]

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[5] Given the importance of employee free choice in the NLRA scheme we hasten to note that the Board does not—and could not

CONCLUSION

For the above stated reasons this petition for a writ of certiorari should be granted if the *certiorari* petition in the connected case of *John Deklewa, et al. v. NLRB, et al.*, No. 88-70, is granted.

Respectfully submitted,

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—claim that the rule we challenge here protects employee rights. Indeed, as the Board itself points out in another part of the decision below:

> A rule granting unilateral repudiation rights to an employer who voluntarily enters a collective-bargaining agreement is not a necessary predicate for advancement of the employee free choice principles embodied in [§ 8(f)'s] second proviso. . . . [A]n employer's decision to repudiate may be based on the employer's own economic considerations, without reference to or concern for the employee's desire to continue the status quo. Even if the employer has a legitimate question as to its employees' representational desires, Congress has expressly provided an electoral mechanism for testing them. [Pet. App. 74a.]

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v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION AND CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the National Labor Relations Board, in reconsidering its prior interpretation of Section 8(f) of the National Labor Relations Act, 29 U.S.C. 158(f), reasonably concluded that a prehire agreement is not voidable at will and must be honored by the employer and the union for the term of that agreement or until the employees covered by the agreement reject, in a Board-conducted election, the union as their bargaining representative.

2. Whether the National Labor Relations Board reasonably decided to apply its interpretation of Section 8(f) retroactively.

3. Whether the National Labor Relations Board reasonably concluded that the union enjoys no presumption of continuing majority status upon the expiration of a prehire agreement, thus allowing either the employer or the union to repudiate the Section 8(f) bargaining relationship at that time.

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No. 88-70

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BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 15a-44a) is reported at 843 F.2d 770.[1] The decision and order of the National Labor Relations Board (Pet. App. 50a-122a) are reported at 282 N.L.R.B. No. 184.

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[1] "Pet. App." refers to the appendix to the petition in No. 88-70.

JURISDICTION

The judgment of the court of appeals (Pet. App. 45a-46a) was entered on April 12, 1988. The petition for a writ of certiorari in No. 88-70 was filed on July 11, 1988. The cross-petition for a writ of certiorari in No. 88-306 was filed on August 10, 1988. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Iron Workers Employer Association of Western Pennsylvania, Inc. (Association) represents a multiemployer bargaining group of construction industry employers. The Association and the International Association of Bridge, Structural and Ornamental Iron Workers, Local 3, AFL-CIO (Union)[2] have been parties to a series of collective bargaining agreements since the late 1950s. Pet. App. 6a, 54a. Those agreements establish wages and other terms and conditions of employment for all employees performing "iron" work; the agreements also include a union-security provision and a provision prohibiting employers from subcontracting work except to other employers bound by the agreement (C.A. App. 41-44, 67).

Petitioners are in the construction business.[3] In June 1960, the Company agreed to be bound by the provisions of the then-current Association agreement. For the next

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[2] The International Association of Bridge, Structural and Ornamental Iron Workers, Local 3, AFL-CIO, is a respondent in No. 88-70 and the cross-petitioner in No. 88-306. To avoid confusion, we will refer to this party as the Union.

[3] The parties stipulated before the Board that John Deklewa & Sons and John Deklewa & Sons, Inc., constitute a single employer within the meaning of the National Labor Relations Act (Pet. App. 5a, 53a). Accordingly, we will refer to petitioners as the Company.

20 years, the Company individually executed and adhered to each successive Association agreement; it did so as a separate entity and not by virtue of its membership in the multiemployer group. In June 1980, the Company joined the Association and, as a member of the Association, later became bound by the 1982-1985 Association agreement. Pet. App. 7a-8a, 53a-54a.

From June 1980 through April 1983, the Company worked on various construction projects and complied with the applicable Association agreements. When the Company performed the work itself, it hired ironworkers through the Union's hiring hall. The Company hired those employees only for the duration of a particular project; the Company did not transfer employees from project to project. When the Company subcontracted work falling within the scope of the agreements, it did so only to subcontractors who were themselves parties to the agreements. Pet. App. 8a, 9a-11a, 55a.

In September 1983, during the term of the 1982-1985 Association agreement, the Company resigned from the Association and notified the Union that it was repudiating that agreement and withdrawing recognition from the Union. At the time, the Company "was not engaged in any construction projects * * * on which it directly employed employees covered by the 1982-1985 labor agreement" (Pet. App. 55a). During the remainder of that agreement's term, the Company subcontracted iron work on one project to a contractor who was not a party to the agreement (*id.* at 11a-12a, 54a-55a). As a result of the Company's actions, the Union filed unfair labor practice charges with the Board (*id.* at 50a).

2. The Board concluded that the Company had violated Section 8(a)(5) and (1) of the National Labor Relations Act (the Act), 29 U.S.C. 158(a)(5) and (1), by repudiating the 1982-1985 Association agreement and by

withdrawing recognition from the Union during the term of that agreement. The Board also concluded that the Company had no obligation to continue to recognize or bargain with the Union once the agreement had expired. Accordingly, the Board ordered the Company to make whole the employees covered by the 1982-1985 agreement for any loss of wages or benefits caused by the Company's repudiation. Pet. App. 96a-100a.[4]

The Board's conclusions stemmed from overruling its earlier decision in *R.J. Smith Construction Co.*, 191 N.L.R.B. 693 (1971), enforcement denied, 480 F.2d 1186 (D.C. Cir. 1973). That decision held that either the employer or the union could repudiate a Section 8(f) agreement at any time before the union obtained majority status in the appropriate bargaining unit.[5] The Board con-

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[4] The Board refused to "extend the make-whole remedy beyond the expiration date of the 1982-1985 contract" because the Company had no obligation to adhere to that agreement once its term expired (Pet. App. 98a).

The Board also ordered the Company to cease and desist from withdrawing recognition from the Union during the term of any prehire agreement with the Union, from refusing to adhere to the 1982-1985 agreement during its term, and from interfering with, coercing, or restraining employees in the exercise of rights guaranteed by Section 7 of the National Labor Relations Act, 29 U.S.C. 157 (Pet. App. 98a-99a).

[5] Section 8(f) of the National Labor Relations Act, 29 U.S.C. 158(f), provides in pertinent part:

> It shall not be an unfair labor practice under subsections (a) and (b) of this section for an employer engaged primarily in the building and construction industry to make an agreement covering employees engaged (or who, upon their employment, will be engaged) in the building and construction industry with a labor organization of which building and construction employees are members * * * because (1) the majority status of such labor organization has not been established under the provisions of sec-

cluded (Pet. App. 78a) that the *R.J. Smith* unilateral repudiation rule, together with the related "conversion" doctrine,[6]

> does not comport fully with Section 8(f)'s text and legislative history, is not the best way to advance [the statutory policies of] employee free choice and labor relations stability in the construction industry, and entails evidentiary determinations that are inexact, impractical, and generally insufficient to support the conclusions they purport to demonstrate.

The Board found that those statutory policies are better served by construing Section 8(f) to impose on the signatory parties an obligation, enforceable through Section 8(a)(5) and (b)(3) of the Act, 29 U.S.C. 158(a)(5) and (b)(3), to comply with the agreement unless the employees vote, in a Board-conducted election, to reject the union as their bargaining representative (Pet. App. 82a).[7] The

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tion 159 of this title prior to the making of such agreement * * *. *Provided further*, That any agreement which would be invalid, but for clause (1) of this subsection, shall not be a bar to a petition filed pursuant to section 159(c) or 159(e) of this title.

[6] That doctrine defined the circumstances under which a union signatory to a Section 8(f) agreement achieved majority status and the prehire agreement was correspondingly converted to an enforceable collective bargaining agreement. In *R.J. Smith Construction Co.*, 191 N.L.R.B. 693, 695 n.5 (1971), and a companion case, *Ruttman Construction Co.*, 191 N.L.R.B. 701, 702 (1971), the Board suggested that, upon an appropriate showing, a Section 8(f) agreement could convert into a Section 9(a) agreement. As the Board developed in later decisions (see Pet. App. 60a-65a), conversion required a showing that the signatory union, during the relevant period, enjoyed majority support among an appropriate unit of the signatory employer's workers.

[7] The Board also determined that a Section 8(f) agreement, during its term, would not bar petitions filed under Section 9(c) and (e) of the Act, 29 U.S.C. 159(c) and (e), and that, with respect to such petitions,

Board further held that, after the Section 8(f) agreement expires, the signatory union enjoys no presumption of majority status, thus allowing either party at that time to "repudiate the [Section] 8(f) relationship" (Pet. App. 84a).

Finally, the Board determined that "the statutory benefits from the announced changes in [Section] 8(f) law for employees, employers and unions in the construction industry far outweigh any hardships resulting from immediate imposition of those changes" (Pet. App. 96a). Accordingly, the Board decided to apply the "new [Section] 8(f) principles to this case and to all pending cases in whatever stage" (*ibid.*).

3. The court of appeals affirmed the Board's decision and enforced its order (Pet. App. 15a-44a). After analyzing the Board's reasons for reconsidering the *R.J. Smith* rule and adopting its new rule, as well as making an "independent analysis of both the legislative history and the text of the statute itself," the court concluded that there is "no viable ground on which to challenge the reasonableness of the Board's *Deklewa* interpretation," and that the Board, "by steering a middle course, reasonably balanced the interests of labor and management" (Pet. App. 39a). The court rejected the Company's argument that this Court's decisions in *NLRB* v. *Iron Workers Local 103* (*Higdon Construction Co.*), 434 U.S. 335 (1978), and *Jim McNeff, Inc.* v. *Todd*, 461 U.S. 260 (1983), foreclosed the Board's reconsideration of the *R.J. Smith* rule. Those decisions, the court of appeals held, had not "adopted the Board's *R.J. Smith* interpretation of § 8(f), as definitive and binding" (Pet. App. 30a). Lastly, the court found that the Board had "balanced the claimed ill effects of retroactivity against the 'mischief of producing a result which is

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the appropriate bargaining unit normally would be a single employer unit (Pet. App. 82a-83a).

contrary to a statutory design or to legal and equitable principles' " in deciding to apply its new interpretation of Section 8(f) retroactively (Pet. App. 42a (quoting *SEC* v. *Chenery Corp.*, 332 U.S. 194, 203 (1947)). The court, perceiving no " 'manifest injustice' " from such retroactive application, thus deferred to the Board's judgment on that issue (Pet. App. 42a).

ARGUMENT

The decision of the court of appeals is correct. It does not conflict with any decision of this Court or of any other court of appeals. Moreover, the validity of the Board's new interpretation of Section 8(f) is pending before several other courts of appeals (see note 9, *infra*); the decision below is only the first appellate ruling on the subject. Accordingly, review by this Court is not warranted at this time.

The Union opposes the Company's petition and agrees that review at this time would be premature (Br. in Opp. 6), but has also filed a conditional cross-petition seeking review of one aspect of the court of appeals' judgment should the Court grant the petition in No. 88-70. Although the decision below is entirely correct in our view, we do not oppose the Union's request that, if the Court grants certiorari to review the petition in No. 88-70, the Court should also grant certiorari to review the cross-petition in No. 88-306.

1. The decision below is the first court of appeals ruling on the validity of the Board's new interpretation of Section 8(f).[8] Cases involving that issue are pending before

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[8] The Company (Pet. 9) cites *Mesa Verde Construction Co.* v. *Northern California District Council of Laborers*, 820 F.2d 1006 (9th Cir. 1987), where the panel declined to apply the *Deklewa* rule in a suit filed under Section 301 of the Labor-Management Relations Act, 29 U.S.C. 185. The court of appeals, however, granted rehearing en banc

several other courts of appeals.[9] The Court would thus benefit from having the views of other courts of appeals before deciding whether to review the Board's new interpretation of Section 8(f). Accordingly, we agree with the Union (Br. in Opp. 6) that review at this time is not warranted.

2. Petitioners contend (Pet. 6-7) that this Court's decisions in *NLRB* v. *Iron Workers Local 103* (*Higdon Construction Co.*), 434 U.S. 335 (1978), and *Jim McNeff, Inc.* v. *Todd*, 461 U.S. 260 (1983), foreclosed the Board's reconsideration of the *R.J. Smith* rule. In *Higdon Construction Co.*, the Court approved the Board's *R.J. Smith* rule that "[a]n employer does not commit an unfair labor practice under § 8(a)(5) when he refuses to honor [a prehire] contract and bargain with the union [where] the union fails to establish * * * that it has ever had majority support" (434 U.S. at 345). The Court explicitly stated, however, that the Board's interpretation of the statute was "not the only tenable one," and accordingly held only that the Board's rule was "an acceptable reading of the statutory language and a reasonable implementation of

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and withdrew the panel's opinion. 832 F.2d 1164 (9th Cir. 1987). The case, argued on March 16, 1988, is pending before the court of appeals.

[9] See *MIS, Inc.*, 289 N.L.R.B. No. 62 (June 30, 1988), appeal docketed, No. 88-5782 (6th Cir. July 26, 1988); *Carthage Sheet Metal Co.*, 286 N.L.R.B. No. 119 (Nov. 30, 1987), appeal docketed, No. 88-1840 (8th Cir. June 13, 1988); *W.L. Miller Co.*, 284 N.L.R.B. No. 127 (July 23, 1987), appeal submitted, No. 87-2332 (8th Cir. June 16, 1988); *Ken Hash Construction, Inc.*, 283 N.L.R.B. No. 132 (Apr. 30, 1987), appeal docketed, No. 87-7280 (9th Cir. Aug. 13, 1987); *W.B. Skinner, Inc.*, 283 N.L.R.B. No. 149 (May 18, 1987), appeal docketed, No. 87-7273 (9th Cir. June 29, 1987); *Viola Industries-Elevator Div., Inc.*, 286 N.L.R.B. No. 29 (Sept. 30, 1987), appeal docketed, No. 88-1837 (10th Cir. June 1, 1988).

the purposes of the relevant statutory sections" (*id.* at 341 (footnote omitted); see *id.* at 350). The court of appeals (Pet. App. 30a), therefore, was correct in concluding that *Higdon* did not preclude the Board, in light of its experience, from reconsidering its construction of the statute.[10] Indeed, *Higdon* expressly foreshadowed the possibility of the Board's changing its view of Section 8(f) (434 U.S. at 351):

> An administrative agency is not disqualified from changing its mind; and when it does, the courts still sit in review of the administrative decision and should not approach the statutory construction issue *de novo* and without regard to the administrative understanding of the statutes.

3. Petitioners also contend (Pet. 9-10) that the Board's new construction of Section 8(f) is inconsistent with the "statutory scheme" of the National Labor Relations Act. Contrary to petitioners' claim, the Board's considered decision to overturn the *R.J. Smith* unilateral repudiation

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[10] Contrary to petitioners' suggestion (Pet. 7-8), *Jim McNeff, Inc. v. Todd, supra,* did not present any question concerning when a party may legally repudiate a Section 8(f) prehire agreement. In that decision, the Court held only that the union, in a suit under Section 301 of the Labor-Management Relations Act, 29 U.S.C. 185, could enforce monetary obligations incurred by the employer under a prehire agreement before its repudiation, despite the union's lack of majority status (461 U.S. at 271-272). To be sure, the Court acknowledged that in *Higdon* the Court had upheld "the Board's view that a union commits an unfair labor practice by picketing to enforce a prehire agreement before it has attained majority status" (*id.* at 267). But the Court in *McNeff* did not reexamine the validity of *Higdon*. Therefore, as the court of appeals correctly observed (Pet. App. 31a-32a), *McNeff* suggested nothing more than that its reliance on *Higdon* reaffirmed the earlier holding that the Board's interpretation of Section 8(f) in that case was reasonable.

rule and the related conversion doctrine falls well within the bounds of the Act.

a. The Board based the *R.J. Smith* rule on its view that Section 8(f) is an exception to established practices designed to " 'assure freedom of choice and majority rule in employee selection of representatives' " (*Higdon Construction Co.*, 434 U.S. at 345 (quoting *Garment Workers* v. *NLRB*, 366 U.S. 731, 739 (1961)). The Board thus placed the burden on the union to show its majority support and authorized the employer unilaterally to repudiate the prehire agreement as a means of forcing the union to prove its majority status. See *R.J. Smith*, 191 N.L.R.B at 694. The Board also anticipated that its rule would promote the Act's goals by providing more immediate responses to employees' wishes. For example, if employees showed dissatisfaction with the Section 8(f) agreement, the employer could withdraw recognition at once and void the contract. On the other hand, if the union showed that the employees working under the agreement were union members or were referred from the union's hiring hall, the employer (and the Board) could infer that the Section 8(f) relationship had "converted" to one based on the majoritarian principles of Section 9(a), 29 U.S.C. 159(a). See Pet. App. 60a-61a. The Board's experience with its rule, however, revealed serious practical problems that undermined the rule's anticipated utility.

For example, although the unilateral repudiation rule invited the employer to be a vicarious champion of the employees' rights, that rule also allowed the employer to walk away from the Section 8(f) agreement "based on the employer's own economic considerations, without reference to or concern for the employees' desire to continue the status quo" (Pet. App. 74a). And, even if employees' antiunion sentiments had prompted the employer's re-

pudiation, those views were irrelevant if the union could show that, at an earlier time, the Section 8(f) relationship had converted into a Section 9(a) relationship (Pet. App. 60a-61a & n.12).

Moreover, unions' attempts to establish such a conversion often involved complex and protracted litigation over whether the employer's work force was stable or hired on a project-by-project basis (Pet. App. 62a, 77a n.37). Those efforts also entailed substantial factual disputes, often involving events occurring well in the past, over such matters as whether the employer had hired most of its employees through the union's hiring hall or whether a union security clause compelled union membership (*id.* at 76a-77a). Although such evidence would be insufficient in other contexts to establish a union's majority status, under the conversion doctrine that evidence could support a finding that the union signatory to a prehire agreement had become the Section 9(a) representative (Pet. App. 77a-78a). Consequently, the union's presentation of such evidence could effectively bar the employer's current employees from obtaining an election or changing their representative for the duration of the prehire agreement (*id.* at 63a, 75a). Such a result, the Board ultimately concluded, "hardly advance[s] the objective of employee free choice" (*id.* at 75a (footnote omitted)).

b. The Board, upon reconsidering the matter, found that neither the language of Section 8(f) nor its legislative history supported *R.J. Smith*'s pivotal assumption that unilaterally voidable prehire agreements would increase employees' freedom to choose their bargaining representative (Pet. App. 65a-72a, 74a & n.31). The final proviso of Section 8(f) refers to the Board's election processes, not to self-help tactics. And, the Senate Report reflected an assumption contrary to that in *R.J. Smith,* namely, that

employees hired under a Section 8(f) agreement would, in most cases, support the union that referred them.[11] That assumption stemmed from testimony that prehire agreements would normally operate in a manner consistent with the wishes of a majority hired under the contracts. As witnesses testified, if the employees in fact did not want the union contract, Section 8(f)'s final proviso would ensure that the prehire agreement would not bar access to the Board's election processes.[12]

Accordingly, the Board reasonably concluded that the language of Section 8(f) and its legislative history provide more support for the view that "Congress specified in the proviso the means by which a party might withdraw from the contract[,] i.e. through the Board's election processes" than for the Board's *R.J. Smith* interpretation that prehire agreements should be subject to unilateral repudiation (Pet. App. 75a n.31; see *id.* at 111a). The Board further concluded that its new interpretation is plainly more consistent with Congress's goal of stabilizing collective bargaining in the construction industry. By enacting Section 8(f), Congress sanctioned the negotiation of prehire agreements that would settle employment conditions in particular areas for periods of up to three years. Employers relied on

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[11] That report (S. Rep. 187, 86th Cong., 1st Sess. 28 (1959)) states:

> A substantial majority of the skilled employees in this industry constitute a pool * * * centered about their appropriate craft union. If the employer relies upon this pool of skilled craftsmen, members of the union, there is no doubt under these circumstances that the union will in fact represent a majority of the employees eventually hired.

[12] See *Labor-Management Reform Legislation: Hearings on S. 505 Before the Subcomm. on Labor of the Senate Comm. on Labor and Public Welfare*, 86th Cong., 1st Sess. 110, 137 (1959) (statement of Archibald Cox); *id.* at 498-499 (statement of Richard J. Gray).

those agreements when bidding on construction projects; employees also relied on them to ensure continuous contract coverage and steady work opportunities under union conditions. See S. Rep. 187, 86th Cong., 1st Sess. 27-28 (1959). Those legitimate expectations of both employers and employees would be frustrated if the voluntary agreements upon which they rely were subject to unilateral repudiation. Pet. App. 66a-68a, 89a-90a.

c. The Board recognized (Pet. App. 87a) that its new interpretation of Section 8(f) assumes that the signatory union becomes a Section 9(a) representative to the extent of permitting the prehire agreement to be enforced under Section 8(a)(5) and (b)(3) during its term or until the employees vote to reject the union.[13] Contrary to petitioners' argument (Pet. 10), the Board's finding of a "limited linkage" (Pet. App. 89a) between Section 8(f) and Sections 8(a)(5), (b)(3), and 9(a), does not impermissibly ignore the majority requirement of Section 9(a). Congress, as the Board found, intended that a prehire contract could not be repudiated during its term unless the employees, in a Board-conducted election, voted to reject the signatory union as their bargaining representative. Congress, therefore, must have intended that an agreement could be enforced by either the employer or the union, absent such an election. The agreement could be enforced under the Act's procedures only through Section 8(a)(5) and (b)(3), provisions which in turn assume that the union is, in some sense, a Section 9(a) representative. Accordingly, the Board reasonably concluded that Congress,

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[13] Section 8(a)(5) and (b)(3) make collective bargaining agreements enforceable only where the signatory union is the "representative" of the employees under "the provisions of section 159(a)." Section 9(a), in turn, provides that a representative "selected * * * by the majority of the employees" in an appropriate bargaining unit is "the exclusive representative[] * * * for the purposes of collective bargaining."

in enacting Section 8(f), implicitly conferred on the signatory union sufficient Section 9(a) status to support the obligation imposed through Section 8(a)(5) and (b)(3) to honor that agreement for its term unless the employees vote to oust the union. Pet. App. 88a-90a; cf. *Fall River Dyeing & Finishing Corp.* v. *NLRB*, No. 85-1208 (June 1, 1987), slip op. 9-11.

4. Finally, petitioners contend (Pet. 11) that the court of appeals erred in upholding the Board's decision to apply its new interpretation of Section 8(f) retroactively. An administrative agency may apply a newly-adopted interpretation retroactively if the adverse effects of that action are outweighed by "the mischief of producing a result which is contrary to a statutory design or to legal and equitable principles." *SEC* v. *Chenery Corp.*, 332 U.S. 194, 203 (1947). The Board, after balancing all of the relevant factors,[14] concluded that "the statutory benefits from the announced changes in [Section] 8(f) law for employees, employers and unions in the construction industry far outweigh any hardships resulting from immediate imposition of those changes" (Pet. App. 96a). The court of appeals thus properly deferred to the Board's decision to apply its new interpretation of Section 8(f) retroactively.[15]

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[14] The Board found that the "infirmities and uncertainties" (Pet. App. 94a) engendered by the *R.J. Smith* rule hardly provided employers with firm bases for repudiating Section 8(f) agreements. The Board also found that the inequity of imposing any new obligations was outweighed by the prior rule's effect of frustrating Section 8(f)'s policies of stability and employees' free choice and by the fact that any continued application of the *R.J. Smith* rule would create administrative problems, delay implementation of the new rules, and increase the burden of litigation. Pet. App. 94a-96a.

[15] Petitioners apparently fault (Pet. 11) the Board for applying the *Chenery* analysis rather than that articulated in *Chevron Oil Co.* v. *Huson*, 404 U.S. 97, 106-107 (1971). As the court of appeals correctly

5. The Union, as cross-petitioner, contends (Cr.-Pet. 6-11) that the court of appeals erred in upholding the Board's conclusion that a union enjoys no presumption of continuing majority status upon the expiration of a prehire agreement, thus allowing either the employer or the union to repudiate the Section 8(f) bargaining relationship at that time. The Board rejected the Union's argument that a union acquires full Section 9(a) status based solely on the employer's voluntary adoption of a Section 8(f) agreement. The Board explained that, if the signatory union were to acquire the rights and privileges of an exclusive bargaining agent, that union "would enjoy a rebuttable majority presumption upon the contract's expiration and could lawfully seek to compel the employer, through strikes or picketing, to negotiate and sign a successor agreement" (Pet. App. 80a). Such a result, however, "would be directly contrary to the express congressional mandate that an employer cannot be coerced, through strikes or picketing, into negotiating or adopting [a Section] 8(f) agreement" (*id.* at 80a-81a (footnote omitted)).

The Union's argument assumes (Cr.-Pet. 9, 10) that Congress enacted Section 8(f) not only to render construction industry contracts enforceable for their terms, but also to provide unions a means, other than through a Board-conducted election, of acquiring full Section 9(a) status because of the difficulty of holding such elections in the industry. Neither the language nor the legislative history of Section 8(f) supports that premise. Congress certainly realized the difficulty of holding elections in the construction industry before an employer hires a representative complement of employees. Congress therefore sanc-

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pointed out, however, the "five factor analysis of *Chenery* is substantively no different than the three factor analysis of *Chevron*" (Pet. App. 42a n.12).

tioned the use of prehire agreements. At the same time, however, Congress envisioned that representation elections could appropriately be held after employees are hired. Congress thus enacted the second proviso to Section 8(f) that permits employees, during the contract's term, to choose to have the issue of representation decided in a Board-conducted election. Indeed, Congress chose not to enact a proposal that would have authorized the Board to certify construction unions without an election, based simply on a union's signing a prehire agreement.[16]

Moreover, the Union's reading of the legislative history (Cr.-Pet. 11) glosses over Congress's concern that Section 8(f) agreements be voluntary and Congress's recognition of the shifting nature of work forces in the construction industry. As the Court observed in *Higdon Construction Co.*, 434 U.S. at 348 n.10, "Congress was careful to make its intention clear that prehire agreements were to be arrived at voluntarily, and no element of coercion was to be admitted into the narrow exception being established to the majority principle." The Board's current policy meets that congressional concern: the voluntary commitment must be honored, but that commitment will not require involuntary recognition of the union or bargaining with that union to secure a future agreement. The Union's position, on the other hand, would permit a union, through strikes and picketing, to force an employer that wanted to change its method of operations to agree to a successor Section 8(f) contract. This state of affairs is precisely what Congress sought to avoid.[17]

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[16] See S. 748, 86th Cong., 1st Sess. § 506 (1959); 105 Cong. Rec. 1273, 1280 (1959); *id.* at 1732 (statement of Secretary of Labor Mitchell).

[17] As the Court further observed in *Higdon Construction Co.*, 434 U.S at 348, Congress considered prehire agreements appropriate for the construction industry because of the employer's needs to know its

CONCLUSION

The petition and cross-petition for a writ of certiorari should be denied. Should the Court, however, grant certiorari to review the petition in No. 88-70, the Court should also grant certiorari to review the cross-petition in No. 88-306.

Respectfully submitted.

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labor costs and to have a readily available labor pool. The Board, recognizing that the employer meets those needs by entering into a prehire agreement, does not offend any principle of voluntariness by requiring the employer to adhere to the agreement for its term. The Board, however, conceivably would offend that principle by forcing an employer to bargain with the union when the employer, having no desire or contractual obligation to take advantage of an available pool of union labor, prefers to use nonunion employees or to subcontract to a nonunion firm.

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